Justices of the Supreme Judicial Court
c/o Barbara Berenson, Esq., Administrative Attorney
Supreme Judicial Court
John Adams Court House
One Pemberton Square, Suite 2500
Boston, MA 02108

Re: Ad Hoc Advisory Committee to Study Canon 3B(9) of the Code of Judicial Conduct

I refer to the report of the committee and the communications of Professor Kaufman and Judge Blitzer. I believe there should be changes to the present Code, but not in the direction the committee proposes.

The considerations involved are well laid out in the three documents before you. They lead me to agree that public confidence in the judiciary will be fostered by the possibility of a response when the judiciary comes under question or attack.

Silence can lead even a fair-minded observer to wonder what the reasons are for an action. People are naturally uneasy in the presence of power from an unaccountable source, and communications from the court may help to meet that uneasiness.

Silence also gives hostile critics an apparently neutral reason to bludgeon the court.

I disagree with the approach advanced in the documents before you that response should come (only) from individual judges[1].

It is impossible to have every action explained in a contemporaneous writing. So it is inevitable that an explanation will usually be wanted only after outcry has arisen. The committee's recommendations would allow the judge to file a memorandum in the case explaining his or her action. However, that personalizes what should be an institutional response.

---

[1] I note there is a reference to a "third party" in proposed subsection (d).

The premise here should be that the judicial system - more than the judge- is under attack or question. To me that means, in most cases, any response should come from a third party - the judges' Chief Justice or an information officer speaking for the judicial system.

If an action is attacked and the judge files a memorandum, no one is fooled that that just happened to happen. It is a defense, and I believe a defense is more seemly if it comes from a Chief or information officer.

Do we not want to adopt a defense which implies the judiciary as a whole supports the judge?

The general approach as to public comments should be that they should be few and usually institutional. If so, the draft should explicitly state that preference and describe what communications a Chief could issue. [2]

The proposed commentary alludes to the possibility of a judge speaking - presumably about a particular case - outside the courtroom.[3] Other than in the subsection (b) context, I believe it is perilous for judges to be speaking in public. The judge is limited to the matters mentioned in subsection (a), but - in an interview with a journalist or a press conference- such a sterile presentation will not satisfy anyone but the judge, and there will be a great danger that the judge will be lured into further discussion. More generally, judges should not be giving press conferences or interviews to begin with. If a judge is to steer the public to the matters in subsection (a), a letter to the editor would suffice.

The draft, in the third paragraph of commentary, mentions the judge's reasoning at the time of the original decision. I suggest there be some recognition that the reasoning is or may be based on the best recollection of the judge. That

---

[2]As to a response, two side points: whoever is communicating should be willing to admit - if the occasion calls for it - that subsequent events show that a different action would have been better than the one criticized, and/or that the judge cannot recall the exact circumstances or reasons for an earlier action.

[3] That possibility is not first raised by the committee's proposal: subsection (a) is in the present Code.

will, as to many cases, simply be the truth. It will also deal implicitly with a faulty, if innocent, recollection. In any event, the last sentence of that paragraph - suggesting intentional misstatement - is demeaning (although certainly not so intended by the committee) and should be stricken.

That paragraph also mentions "educating" the public. "Informing" would do as well and doesn't have a condescending tone, which - to my ears- "educating" does.

Educational exemption

The committee has recommended, appropriately, expanding subparagraph (b) to parallel Canon 4B.

Reviewing that led me to ask - both as to the present Code and the committee's proposal - what the subsection was aimed at.[4] I take it the imagined situation was judges involved in a legal education activity, and the question was whether they could mention a pending case or cases.

I read both the present subsection and the proposed revision to allow a judge in a legal symposium (for instance) to discuss his or her own case. If so, that raises the question put by Professor Kaufman in the first paragraph of his comments on "The Education Exemption."

I cannot recall the discussions - as to the present Code - about the limitation to appellate cases. I concur with Professor Kaufman about the committee's justification of that.

August 4, 2008 _____/s/_____
Peter W. Kilborn

[4] There was no similar provision in the pre-2003 Code.